IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR

Criminal Appeal No. 1115 of 2001.

APPELLANTS (In Jail) : 1. Dharm Sai son of Ilyas Minz, aged about 19 years.

2. Alam Sai son of Bhauka Ram Tirkey aged about 21 years.

Both are in occupation of cultivatio -n, and residents of Hardijhiriya, Banshipur, P.S.-Sitapur, Distt. Surguja (C.G.).

4481 9-11-01 Shukla Advocate R. to AR

V E R S U S

RESPONDENT : The State of Chhattisgarh Through : P.S.- Sitapur, Distt. Surguja (C.G.).

APPEAL UNDER SECTION 374 (2) OF THE CODE OF CRIMINAL PROCEDURE, 1973 :

(S1) (S4)

A.F.R.

HIGH COURT OF CHHAGGISGAR AT BILASPUR

Cr. Appeal No. 1115/2001

Dharm Sai and another

Vs.

The State Chhattisgarh

Post for Judgment : 28 .04.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

Noted.
28/4/06
G.A.

(52) (53)

A.F.R.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.1115/2001

Single Bench: Hon'ble Shri **Dilip Raosaheb Deshmukh, J.**

Dharm Sai and another

Versus

The State of Chhattisgarh

Shri Ashok Kumar Shukla, Counsel for the appellants.

Shri Arun Sao, Government Advocate for the State.

JUDGMENT

(Delivered on this 28th day of April 2006)

This appeal is directed against the judgment dated 19.10.2001 delivered by Shri T.R.Burman, 1st Additional Sessions Judge, Ambikapur, Dist. Surguja in Sessions Case No.189/2001 whereby the appellants were convicted for offence under Section 376 (2) (g) of I.P.C. and were sentenced to undergo rigorous imprisonment for 10 years and a fine of Rs.1000/- and in default to undergo R.I. for 6 months each.

2. Briefly stated the prosecution story is that on 16.5.2000 at about 10.00 P.M. the prosecutrix, aged about 17 years, was returning from village Aara to her home in Hardijhiria. She was accompanied by Manju and Lalsai. On way near *Ginamoda* the appellants started teasing her. The appellant-Dharam Sai pulled the hand of the prosecutrix. When Manju and Lalsai intervened they were threatened by the appellants. Both Manju and Lalsai went away. The appellants dragged the prosecutrix to a nearby field situated at a distance of about 50 meters. Dharam Sai

felled the prosecutrix on the ground and after undressing mounted on the prosecutrix and committed rape on her while the appellant Alamsai stood nearby. When Alamsai was about to commit rape on the prosecutrix she said that she was feeling thirsty, and therefore, she should first be given some water. Both the appellants took the prosecutrix to the house of Simon Uraon situated at a distance of one and half kilometers from the place of occurrence. The prosecutrix entered the house of Simon Uraon and did not come out. The appellants entered the house of Simon Uraon and attempted to drag the prosecutrix out. However, Simon Uraon and his wife Bodidevi prevented the appellants from doing so. Thereafter, the appellants went away. The prosecutrix remained in the house of Simon Uraon. At 3.00 A.M. her father Rijhanram P.W.1 while returning from village Aara saw the prosecutrix in the house of Simon Uraon. The prosecutrix did not narrate the incident to Rijhanram or to her mother on returning home. On the next date when Manju informed Rijhanram about the incident, he asked the prosecutrix whereupon she narrated the incident to Rijhanram and mother Gulabari P.W.2.

3. F.I.R. was lodged on the next date i.e. 17.5.2000 at 6.00 P.M. in Police Station Sitapur by the prosecutrix. She was sent for medical examination Dr. Pratibha Jain P.W.4 who examined the prosecutrix did not find any mark of violence on her body. No internal injury was found. There was an old vaginal tear present. There was no tenderness in the private parts. Vaginal slides were prepared and handed over to the Police. The Police also seized the petticoat of the prosecutrix on 18.5.2000. On

being sent for medical examination, the F.S.L. vide report Ex.P.14 did not find any semen or human spermatozoa on the vaginal slides and the petticoat of the prosecutrix. The appellants were examined by Dr. K.K.Dutta P.W.5 who found them capable of performing sexual intercourse. After completion of investigation, the appellants were prosecuted for offence under Section 376 (2) (g).

4. The appellants abjured the guilt, pleaded false implication and led no evidence in defence. The prosecution examined as many as 7 witnesses. Relying upon the evidence led by the prosecution, the trial Court convicted and sentenced the appellants as aforesaid in paragraph 1.

5. Learned Counsel for the appellants has read the testimony of the prosecutrix in *extenso* and argued that it fails to inspire confidence and is not worth placing credence. It was also contended that neither the medical evidence of Dr. Pratibha Jain P.W.4 nor the report of F.S.L. Ex. P.14 supported the prosecution story. It was also argued that the prosecutrix had specifically testified the date of occurrence to be 15.5.2000 and the date of lodging the report to be 17.5.2000 in paragraph 11 of her testimony whereas the F.I.R. Ex.P.1 showed that the incident was reported to have occurred on 16.5.2000. It was also contended that the prosecutrix had admitted in paragraph 15 of her testimony to have sworn an affidavit at the instance of her father Rijhanram vide Ex.D.3 which clearly showed that the appellants did not commit any rape on the prosecutrix. On these grounds, the learned counsel for the appellants prayed that conviction of the appellants under Section 376(2)(g) of the I.P.C.

and the sentence awarded thereunder deserve to be set aside. On the other hand, Shri Arun Sao, Government Advocate argued in support of the impugned judgment.

6. Having heard the rival contentions, I have perused the record of Sessions Case No.189/2001. As held in *Bharwada Bhoginbhai Hirjibhai v. State of Gujrat* **AIR 1983 SC 753** by the Apex Court, it is well settled that a conviction for an offence of rape can be based on the sole testimony of the prosecutrix provided her testimony inspires confidence and is worth credence and the "probabilities-factor" does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming. Testing the testimony of the prosecutrix on the above touchstone, I find for the reasons mentioned below that the prosecutrix is a wholly unreliable witness and no credence can be placed on her testimony.

7. The prosecutrix in paragraph 3 of the testimony stated that on being asked by Alamsai, the appellant Dharam Sai had committed rape on her. She has further stated that thereafter on her pretext of feeling thirsty she was taken by the appellants to the house of Simon Uraon where the appellant Alamsai also entered the house and was forcibly pulling her but Smt. Bodidevi, wife of Simon Uraon, came to her rescue whereupon the appellants went away. She has also mentioned in paragraph 1 that while returning from village Aara from a marriage ceremony, she was accompanied by Manju and Alamsai who had

objected when the appellants started teasing her. She further stated that on being threatened by the appellants, Manju and Lalsai went away. However, contradicting the version of the prosecutrix, Rijhanram has stated in paragraph 1 that the prosecutrix had told him that the appellant-Alamsai had outraged her modesty. While being asked as to whether the appellant-Dharam Sai had outraged the modesty of the prosecutrix, this witness clearly stated that this fact could be narrated only by the prosecutrix. In other words, Rijhanram, father of the prosecutrix has nowhere stated that the prosecutrix had told him that Dharam Sai committed rape on her.

8. Gulabari P.W.2 has also stated in paragraph 4 that the prosecutrix did not inform anything to her about the incident. Even she has stated that Alamsai had committed "*Bura Kaam*" on the prosecutrix due to previous animosity. Thus, both Rijhanram P.W.1 and Gulabari P.W.2 have not deposed that the prosecutrix had informed them about any rape committed by Dharam Sai on her.

9. It is pertinent to note that in the F.I.R. the prosecutrix had narrated that on the date of occurrence while returning with her father from the house of Simon Uraon she did not inform about the incident either to Rijhanram or to Gulabari and it was only when Manju who was accompanying her while returning from *Baaraat*, came to her house in the morning and narrated the incident to her parents, that she informed her parents. Manju and Lalsai were cited as witnesses by the prosecution but were not examined without there being any

explanation. Similarly, Smt. Bodidevi and Simon Uraon were also cited as witnesses but were not examined by the prosecution without assigning any reason therefore. An adverse inference needs to be drawn against the prosecution for non-examination of Manju, Lalsai, Simon Uraon and Smt. Bodidevi who were material and independent witnesses who would have thrown light upon the incident that took place on 16.5.2000.

10. The prosecutrix has stated in paragraph 8 that the appellants had dragged her towards the bushes. The spot map prepared by Sub-Inspector M.K.Singh P.W.7 vide Ex.P.8 clearly shows that the prosecutrix was dragged for a distance of 50 meters from the road before committing rape on her. If the version of the prosecutrix is to be believed, then some external injuries on her person were expected to be found. However, the testimony of Dr. Pratibha Jain P.W.4 does not corroborate the testimony of the prosecutrix since she did not find any mark of violence on her body. She found that the prosecutrix had an old vaginal tear, was used to sexual intercourse and no tenderness was found on her private parts. The absence of any semen or human spermatozoa on the vaginal slides of the prosecutrix, as per report of F.S.L. Ex P.14, also renders the testimony of the prosecutrix unworthy of credit.

11. The prosecutrix has in paragraph 15 of her testimony admitted that at the instance of her father she had sworn affidavit vide Ex.D.3 which bears her signature. Ex.D.3 clearly shows a positive assertion by the prosecutrix that the appellant Dharam Sai did not commit any rape on her and was not even present at the place of occurrence and only Alamsai who had

simply teased her had run away upon intervention by Manju and Lalsai. The admission of swearing such an affidavit by the prosecutrix clearly renders her testimony unworthy of any credit.

12. The prosecutrix has in paragraph 16 admitted that her father and Alamsai had a previous animosity. There was tension prevailing between the two families. Rijhanram P.W.1 has also stated in paragraph 2 that there was an old animosity with Alamsai. Gulabari P.W.2 has also corroborated the above fact. It, therefore, cannot be ruled out that a false report was lodged by the prosecutrix against the appellants.

13. It is pertinent to note that the prosecutrix had, at several places in her testimony, made a positive assertion that the incident had occurred on 15th May 2000 and that she had informed her father for the first time after two days i.e. on 17th of May 2000 and a report was lodged thereafter. This wholly contradicts the F.I.R. dated 17.5.2000 which shows the date of occurrence as 16.5.2000. The prosecution has thus failed to establish that rape was committed on the prosecutrix on 15.5.2000 by the appellant-Dharam Sai.

14. Having thus considered the evidence led by the prosecution in its entirety, it emerges that the testimony of the prosecutrix is wholly unreliable and not worth placing any reliance. Due to non-examination of material and independent witnesses Manju, Lalsai, Simon Uraon and Bodidevi, adverse inference is drawn against the prosecution for suppressing the genesis of the case. Medical evidence and the report of the F.S.L. also did not corroborate the testimony of the prosecutrix

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in any manner. The affidavit Ex.D.3 sworn by the prosecutrix clearly renders her testimony unreliable. The previous animosity of appellant-Lalsai with the father of the prosecutrix is also borne out from the evidence led by the prosecution. It also emerges that the prosecutrix had lodged the report two days after the occurrence which renders the date of incident mentioned in the F.I.R. ExP.1 doubtful. The testimony of the prosecutrix is not corroborated in any manner by her father Rijhanram who did not state that she had told him about any rape committed upon her by Dharam Sai. The assertion made by the prosecutrix in the F.I.R. about not informing her parents after the occurrence and the non-examination of Manju and Lalsai in the above context renders the prosecution story extremely doubtful. It cannot be ruled out that the appellants have been falsely implicated for the offence punishable under Section 376 (2) (g) I.P.C.

15. In the result the appeal is allowed. Conviction of the appellants under Section 376 (2) (g) I.P.C. and the sentence awarded thereunder are set aside. The appellants are acquitted of the charge under Section 376 (2)(g) I.P.C. The appellant-Dharam Sai shall be set at liberty forthwith, if not required in any other case. Bail bonds of ~~the~~ appellant Alamsai stand cancelled. Fine, if paid, shall be refunded to the appellants.

Sd/-
Dilip Raosaheb Deshmukh
Judge

Anjani